

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED
5-19-14
04:59 PM

Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

A.14-04-013
(Filed April 11, 2014)

**PROTEST
OF THE OFFICE OF RATEPAYER ADVOCATES**

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May 19, 2014

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Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U-6874-C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U-6955-C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a).

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I. INTRODUCTION

Pursuant to Rule 2.6 of the Commission's Rules of Practice and Procedure, ORA Protests the Joint Application (Application) of Comcast Corporation, Time Warner Cable, Inc. (Time Warner Cable) on behalf of itself and its wholly-owned subsidiary Time Warner Cable Information Services (California), LLC (TWCIS), and Bright House Networks Information Services (California), LLC (Bright House) (collectively, Joint Applicants) to request that the Commission authorize the transfer of indirect, ultimate control of Time Warner Cable's wholly-owned subsidiary, TWCIS to Comcast

Corporation under Public Utilities (P.U.) Code Section 854(a).¹ In addition, the Application also seeks authority for the *pro forma* transfer of Time Warner Cable's indirect, legal interest in the certificate held by Bright House.

As further discussed below, based on the information provided in the Application, as well as what was not in the Application but what is commonly known, the proposed merger does not appear to be in the public interest and does not appear to comply with existing laws and regulations.² On its face, the Application concerns only the merger of three existing competitive local exchange carriers (CLECs). In reality, however, and as is commonly known, the proposed merger would unite potentially the two largest providers of high-speed last mile broadband service in the State. While the proposed merger would likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services, its most pronounced effect is likely to be in the separate market for last-mile access to consumers, *i.e.*, in the interface between Internet content providers like Netflix, Google, Wikipedia, Amazon and the like, and last-mile providers like Comcast and Time Warner Cable.

This is exemplified by the recent Comcast-Netflix dispute. It appears Comcast had (and has) incentive to slow down and obstruct the Internet traffic of a content provider that competes directly with its own video programming. The D.C. Circuit, for instance, recently characterized last-mile broadband providers as “terminating monopolists,” and agreed that they had the incentives to degrade the transmissions of competing content providers.³

If the merger is approved, Amazon, Google, Facebook and all the other roughly 180 of the largest Internet content providers – most of them based right here in California – will have one less gatekeeper to deal with, but a gatekeeper that controls twice as many

¹ Application at 1.

² P.U. Code § 854; 47 U.S.C. § 1302(a) (Section 706).

³ *Verizon v. FCC*, 743 F.3d at 646 (D.C. Cir. 2014).

customers. Neither Comcast's nor Time Warner Cable's market share in California – measured by homes passed over total homes in the State – is precisely known, hence the importance for the Commission to look into such data to determine if the post-merger entity will control access to more high-speed broadband subscribers than any other entity in the State.

ORA is not alone in its concerns regarding the proposed merger. On April 8, 2014, 50 public interests group signed a letter to United States (U.S.) Attorney General Holder and Federal Communications Commission Chairman (FCC) Wheeler regarding their concerns about the merger. The letter, which ORA attaches to its Protest, provides: “This massive consolidation would position Comcast as our communications gatekeeper, giving it the power to dictate the future of numerous industries across the Internet, television and telecommunications landscape.”⁴ The letter further states:

This merger is, at its core, about broadband, the most profitable and fastest-growing segment of the cable industry. Comcast's service area would cover almost two-thirds of the U.S., and it would be the only broadband provider that could deliver truly high-speed Internet and pay-TV services to nearly four out of every 10 U.S. homes. This union would give Comcast control over half of the nation's next-generation broadband customers and more than half of the pay-TV/Internet-bundled subscribers. . . . Comcast has repeatedly flexed its corporate and political muscles to get what it wants, even if that has meant harming competition, consumers and communities.⁵

Precisely because the details of this market are largely unknown, the Commission should pause, gather data, and assess the effects of the merger on this crucial marketplace. Indeed, this is precisely what leading California voices have urged. In a

⁴ Exhibit A, Letter of 50 Public Interests Groups to U.S. Attorney General Holder and FCC Chairman Wheeler, April 8, 2014.

⁵ *Id.*

February 15, 2014 editorial, the San Francisco *Chronicle* urged the FCC “to ponder carefully whether to approve a deal that threatens to undermine competition and consumer choice.”⁶ As explained below, however, it is not only the FCC that has delegated authority to monitor broadband competition; the 1996 Telecommunications Act delegated this authority equally to the FCC and “state commissions.” As it did in the AT&T-T-Mobile merger,⁷ this Commission should robustly investigate the California-specific effects of the proposed merger on California consumers. It is for these reasons that ORA protests this application.

ORA recommends that the California Public Utilities Commission (CPUC) re-categorize this proceeding as adjudicatory and either open a fact-finding phase in the existing proceeding or open an Order Instituting Investigation (OII) into the planned purchase and acquisition by Comcast of Time Warner Cable in order to gather facts so that the CPUC may determine whether the proposed merger complies with applicable laws and regulations and is in the public interest.

II. BACKGROUND

A. Time Warner Cable Companies

Time Warner Cable is a publicly traded Delaware corporation.⁸ Its network facilities cover portions of 31 states, including California. Time Warner Cable is the second largest provider of cable service and third largest provider of broadband service in

⁶ “The Cable guys,” *San Francisco Chronicle*, A10 (February 15, 2014); *see also* “Comcast/Time Warner: The making of a cable TV giant,” *Los Angeles Times* (February 14, 2014), available at <http://www.latimes.com/opinion/editorials/la-ed-comcast-time-warner-20140214-story.html> (“The shortage of

⁷ Order Instituting Investigation on the Commission’s Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy, I.11-06-009.

⁸ The information on Time Warner Cable Companies comes from the Application. ORA reserves the right to update this information later in this proceeding once it is able to obtain more information concerning the structure of the Time Warner Cable companies.

California.⁹ According to Time Warner Cable, it offers interconnected Voice over Internet Protocol (“VoIP”) services in the areas it serves.¹⁰

Time Warner Cable’s residential broadband offerings consist of three tiers, differentiated by price and download/upload speeds. TWCIS is a wholly-owned subsidiary of Time Warner Cable.¹¹ TWCIS is a limited liability company organized under the laws of the state of Delaware authorized to do business in California.¹² TWCIS is authorized to provide limited facilities-based and resold interexchange services as a non-dominant interexchange carrier (NDIEC) and limited facilities-based and resold local exchange services as a CLEC in California pursuant to a Certificate of Public Convenience and Necessity (CPCN) issued by this Commission on March 16, 2004.¹³ According to the Application, TWCIS does not itself provide direct end-user voice services but offers wholesale telecommunications services, including switched access service and local interconnection service to retail VoIP providers including TWCIS’s own non-carrier affiliate; TWC Digital Phone, LLC.¹⁴ The CPUC recently designated TWCIS as an Eligible Telecommunications Carrier (ETC) for the purposes of offering Lifeline services in D.14-03-038 (issued April 3, 2014). As part of its application for ETC designation, TWCIS stated that “TWC Digital Phone LLC plans to transfer its retail customers to TWCIS well before it begins offering Lifeline services in California.”¹⁵ As of the date of this protest, no transfer of retail customers has occurred and TWCIS has

⁹ <http://www.consumerwatchdog.org/story/consumer-groups-want-government-reject-comcast-time-warner-cable-deal>

¹⁰ Application at 3.

¹¹ *Id.*

¹² *Id.*

¹³ *In The Matter of the Application of Time Warner Cable Information Services (California), LLC for a Certificate of Public Convenience and Necessity to Provide Facilities-Based and Resale Competitive Local, IntraLATA and InterLATA Voice Service*, D. 04-03-032.

¹⁴ *Id.* at 4.

¹⁵ Application at 4.

not begun offering any Lifeline services to California customers. TWCIS also offers products and services to business customers.

In California, Time Warner Cable, through TWC Digital Phone LLC, currently provides its competitive voice services using VoIP technology to residential and business customers in Time Warner Cable's footprint in Southern California. Additionally, Time Warner Cable, through its cable and other subsidiaries, offers video and high-speed data services.

B. Bright House California

Bright House California (U-6955-C) is a Delaware corporation. Bright House California was authorized to provide limited facilities-based and resold interexchange services as an NDIEC and limited facilities-based and resold local exchange services as a CLEC in D.05-06-045. Bright House California operates as a wholesale telecommunications carrier providing telecommunications services to its direct parent, Bright House Networks, LLC and other carriers, including backhaul services to wireless carriers.¹⁶ Currently, Time Warner Cable holds 66.67 percent of Time Warner Entertainment Advance-Newhouse Partnership, which in turn is the sole member of Bright House Networks.

Joint Applicants state that the transaction will not result in any actual change of control over the Bright House California licenses and authorizations, because Advance/Newhouse Partnership currently has, and after closing will retain, all day-to-day managerial control over, and all economic interest in, all of the licenses and authorizations held by Bright House Networks, including the CPCN held by Bright House California.¹⁷

¹⁶ Application at 5.

¹⁷ *Id.*

C. Comcast Corporation

Comcast Corporation is a publicly traded corporation organized under the laws of Pennsylvania. Comcast Corporation has network facilities covering portions of 39 states and the District of Columbia.¹⁸ Comcast is the largest provider of broadband and cable in the United States.¹⁹ Comcast offers broadband services differentiated by price and download/upload speeds to its residential customers.

Comcast Phone of California, LLC (“Comcast Phone”) holds a certificate of public convenience and necessity (CPCN), U-5698-C, from the Commission to provide facilities-based and resold local exchange and interexchange telecommunications services in California as a competitive local exchange carrier (CLEC). According to Comcast, Comcast Phone is primarily a wholesale provider offering interconnection and other regulated services, of which Comcast IP Phone II, LLC (“Comcast IP”) receives through an interconnection agreement with Comcast Phone.²⁰ Comcast further claims that Comcast Phone does not offer any retail services to residential customers, but does have retail business customers.²¹

Comcast maintains that it provides residential telephone service through its affiliate Comcast IP; this service is known as XFINITY Voice.²² However, Comcast advertises XFINITY Voice on its website simply as a “Comcast” service, rather than one specifically provided by Comcast IP.²³ Similarly, the telephone bill for XFINITYVoice does not list Comcast IP anywhere.²⁴ Rather, the bill indicates that it is from “Comcast.”

¹⁸ *Id.* at 6.

¹⁹ <http://articles.latimes.com/2014/apr/09/entertainment/la-et-ct-comcast-fcc-20140409>

²⁰ *Order Instituting Investigation into the Unauthorized Disclosure and Publication and Unlisted Telephone Numbers by Comcast* (Comcast OII), I. 13-10-003 at 4.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 5.

Comcast Phone and Comcast IP have the same officers and principal place of business. Both entities also share some employees, though Comcast did not clarify the nature and extent of this commonality, generally stating that it is a complex question.²⁵ Comcast also states that business operations staff from various Comcast entities supports both Comcast Phone and Comcast IP.²⁶

III. Legal Basis for ORA's Protest

1. Section 706 (Codified at 47 U.S.C. § 1302)

The District of Columbia Circuit Court of Appeal (D.C. Circuit or Court) recently issued a decision, *Verizon v. FCC* 740 F.3d 623, 638 (D.C. Cir. 2014), which discussed Section 706(a) of the 1996 Telecommunications Act (Section 706) concerning advanced telecommunications incentives. Section 706 provides:

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁷

Section 706 defines “advanced telecommunications services” to include broadband.²⁸

In *Verizon v. FCC*, the D.C. Circuit determined that Section 706 was a grant of authority to the FCC **and to the state commissions** to take concrete steps that will

²⁵ *Id.*

²⁶ *Id.*

²⁷ Section 706 is codified at 47 U.S.C. § 1302(a), *et seq.*

²⁸ 47 U.S.C. § 1302(d)(1) states: “The term ‘advanced telecommunications capability’ is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.”

promote competition in broadband.²⁹ The D.C. Circuit also found that that Congress, in passing the 1996 Telecommunications Act, most likely relied on the FCC's continued oversight of broadband facilities.³⁰ Notably, the Court reasoned that "the legislative history suggests that Congress may have, somewhat presciently, viewed that provision [Section 706(a)] as an affirmative grant of authority to the Commission whose existence would become necessary **if other contemplated grants of statutory authority were unavailable.**"³¹ The Court also quotes the Senate Report's description of section 706 as a "'necessary fail-safe' 'intended to ensure that one of the primary objectives of the [Act]--to accelerate deployment of advanced telecommunications capability--is achieved.'"³² Thus, the D.C. Circuit's recent opinion underscores that Section 706 clearly delegates authority to the states to take concrete steps that will promote broadband competition.

The D.C. Circuit noted that, in Section 706, Congress delegated authority to *both* the FCC and the states. In response to Verizon's contention that "Congress would not be expected to grant both the FCC and state commissions the regulatory authority to encourage the deployment of advanced telecommunications capabilities", the Court reasoned, "Congress has granted regulatory authority to state telecommunications commissions on other occasions, and we see no reason to think that it could not have done the same here."³³ Because the language in Section 706 does not distinguish

²⁹ 740 F.3d at 637-640.

³⁰ "To the contrary, ... when Congress passed section 706(a) in 1996, it did so against the backdrop of the Commission's long history of subjecting to common carrier regulation the entities that controlled the last-mile facilities over which end users accessed the Internet. Indeed, one might have thought, as the Commission originally concluded, that Congress clearly contemplated that the Commission would continue regulating Internet providers in the manner it had previously." 740 F.3d at 639.

³¹ *Id.* (emphasis added).

³² 740 F.3d at 639 (citation omitted).

³³ 740 F.3d at 638.

between the delegation to the FCC and to the state commissions, the CPUC may invoke Section 706 in its review of the merger of Comcast and Time Warner Cable.

The plain language of Section 706 directs states to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Thus, the CPUC has the authority to adopt some regulations and conduct a review of advanced telecommunications services in California. ORA contends that under Section 706, the CPUC has delegated power to promote competition by adopting rules for broadband providers, including issuing data requests to ascertain who owns telecommunications infrastructure in California; monitoring broadband service quality and consumer protection and imposing relevant rules if needed; monitor market concentration; and adopting strong reporting requirements so that states may assist federal agencies in monitoring and promoting competition.³⁴

2. P.U. Code Section 854 (Section 854)

The Joint Applicants filed the merger application pursuant to Section 854. Under Section 854, the Commission must find that the merger, “[p]rovides short-term and long-term economic benefits to Ratepayers . . . [n]ot adversely affect competition, and must examine several factors to ensure that the merger is in the public interest.”³⁵ Section 854’s language indicates that it applies to public utilities, which in the proposed merger are TWCIS, Comcast Phone and Bright House California.

³⁴ SB 1161 should not be an impediment to a robust Commission investigation here. Section 710 of the Public Utilities Code prohibits Commission jurisdiction or control over IP-enabled services “except as required or expressly delegated by federal law,” and Section 706, codified at 47 U.S.C. § 1302(a), provides that delegation.

³⁵ P.U. Code § 854.

In order to approve the proposed merger under Section 854(b), the CPUC will need to find that the merger “[p]rovides short and long-term economic benefits to ratepayers” and does not “adversely affect competition”.³⁶ Joint Applicants have failed to make this showing, as required under Section 854(e).³⁷ Furthermore, under Section 854(c), the CPUC must consider a list of eight criteria “and find, on balance, that the merger, acquisition, or control proposal is in the public interest. These criteria include:

- (1) Maintain or improve the financial condition of the resulting public utility doing business in the state.
- (2) Maintain or improve the quality of service to public utility ratepayers in the state.
- (3) Maintain or improve the quality of management of the resulting public utility doing business in the state.
- (4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees.
- (5) Be fair and reasonable to the majority of all affected public utility shareholders.
- (6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility.
- (7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state.
- (8) Provide mitigation measures to prevent significant adverse consequences which may result.

Lastly, Section 854 requires the Commission to “consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition,

³⁶ P.U. Code § 854(b).

³⁷ P.U. Code § 854(e) states: “The person or corporation seeking acquisition or control of a public utility organized and doing business in this state shall have, before the commission, the burden of proving by a preponderance of the evidence that the requirements of subdivisions (b) and (c) are met.”

or control, to determine whether comparable short-term and long-term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal.”³⁸

IV. DISCUSSION

A. Approval of a Merger While there is Current Litigation Involving Comcast and Time Warner is not in the Public Interest

1. Comcast OII

On October 8, 2013, the CPUC issued an OII against Comcast, I.13-10-003 to consider whether the Commission should impose a fine or order other remedies for Comcast’s apparent actions in violation of privacy-related laws. The OII is examining Comcast Phone and its affiliates (collectively “Comcast”) “violated any laws, rules, and regulations of this State in disclosing and publishing the names, telephone numbers, and addresses of Comcast residential subscribers who had paid to have that personal information ‘unlisted.’”³⁹ The OII noted that:

[b]ecause of an admitted error by Comcast, over 74,000 Comcast residential subscribers had their confidential information made public through different directories, i.e., directory assistance services, phone books, and/or the Internet. This confidential customer information was erroneously published for 27 months, from July 2010 through December 2012, before detection by Comcast.⁴⁰

The CPUC also stated in the OII that it is “greatly concerned about the potential breach of customers’ right of privacy, as well as the significant delays with respect to

³⁸ P.U. Code § 854(d).

³⁹ I.13-10-003 at 1.

⁴⁰ *Id.* at 1-2.

both the detection and reporting of Comcast's admitted failure to guard the identities of its unlisted subscribers."⁴¹

The OII discusses the seriousness of Comcast's breach of privacy as many of the customers who asked to have their information kept private did so to protect their health and safety. For example, some customers were in the witness protection program, while others were victims of domestic violence. As a result of Comcast's error, Comcast put the lives of the customers and their families at risk.⁴² The OII and the Staff Report also detail Comcast's poor handling of customer complaints. Many customers complained of extreme frustration with Comcast.⁴³

ORA agrees that Comcast's release of private information is a serious matter. Almost as troubling is Comcast's handling of the matter before the CPUC. Comcast waited to inform the Commission of the problem until January 9, 2013, nine days after the effective date of SB 1161, codified as P.U. Code Section 710, which prohibits the Commission from regulation of VoIP.⁴⁴ Comcast claims it was not aware of the problem until it received two complaints, on October 2 and 8, 2012, three months before Comcast notified the Commission.⁴⁵ The OII and accompanying staff report details complaints concerning the publication of unlisted information that CPUC staff found **on Comcast's own complaint forum** that date from March 2010 to August 13, 2013.⁴⁶ The CPUC's

⁴¹ *Id.* at 2.

⁴² *Id.* at 10-11; *see also* Staff Report on Investigation of Comcast Phone of California, LLC and Related Entities Concerning the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers (Staff Report), dated September 25, 2013, at 13-20; Staff Report Attachments at 20-23.

⁴³ *Id.*

⁴⁴ *Id.* at 18; P.U. Code §§ 239, 710.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 9.

Consumer Affairs Branch (CAB) received complaints on this in January, 2009, **four years before Comcast informed the CPUC of this problem.**⁴⁷

It also appears that Comcast did not fully cooperate with the Safety and Enforcement Division (SED) staff investigation into this matter. Comcast refused to answer a set of data request questions issued on February 22, 2013, claiming that the Commission “lacked jurisdiction over the unauthorized disclosure of unlisted telephone numbers.”⁴⁸ Comcast instead requested to meet and confer with CPUC Legal Division staff. Comcast had three meetings with CPUC Legal Division staff, including a meeting with the General Counsel, on March 15, 2013, March 26, 2013, and June 13, 2013.⁴⁹ While Comcast eventually provided responses to many of SED’s data requests, the Staff Report notes that Comcast did “not provide to SED important customer information, including a list of affected customers and any of Comcast’s records of complaints or inquiries from customers that contacted Comcast about the unauthorized disclosure of unlisted numbers, except for a couple of complaints from the FCC and the Better Business Bureau . . .”⁵⁰

Comcast’s lack of transparency with the CPUC in its OII investigation rings all too familiar. The FCC faced similar problems with Comcast in its proceeding concerning Comcast’s selectively targeting and interfering with connections to peer-to-peer applications.⁵¹ In its decision on the matter, the FCC observed that Comcast, “when first confronted with these reports [that Comcast had interfered with connections to

⁴⁷ *Id.*

⁴⁸ Staff Report at 23.

⁴⁹ Staff Report at 23.

⁵⁰ *Id.*

⁵¹ *Memorandum and Order*, In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management”, File No. EB-08-IH-1518, WC Docket No. 07-52, FCC 08-183, at 1-4.

peer-to-peer applications] . . . misleadingly disclaimed any responsibility for the customers' problems."⁵²

The Comcast OII provides a view into the practices, management and customer service of Comcast. Comcast's treatment of its customer's private information, its poor handling of the grave error after its discovery, and its apparent lack of transparency on this matter with the CPUC demonstrates that the proposed merger is not in the public interest. Surely Comcast should get its own house in order before considering acquiring another large company such as Time Warner Cable.

2. City of Los Angeles lawsuit against Time Warner Cable

On March 14, 2014, after years of attempted negotiations, the City of Los Angeles filed a lawsuit against Time Warner Cable alleging that Time Warner Cable "blatantly refused to live up to its obligations to the city" to pay franchise fees to operate its cable network over city-owned rights of way while collecting more than \$500 million a year from customers in the city.⁵³ The lawsuit contends that Time Warner Cable owed \$2.5 million in franchise fees and public, education and governmental channel fees in 2008 and 2009 and an additional \$7.2 million in fees in 2010 and 2011, in violation of the Digital Infrastructure and Video Competition Act of 2006 (DIVCA).⁵⁴ The City claims that once in 2008 and again in 2011, Time Warner Cable withheld more than \$5 million in fees the city said it was owed. The company finally paid a portion of the disputed fees but then subtracted the same amount from its franchise fee payment, resulting in another underpayment.⁵⁵

⁵² *Id.* at 3, ¶ 6.

⁵³ *City of Los Angeles v. Time Warner Cable, Inc.*, Case No. CV-14-1984, Central Dist. CA, Complaint for Damages and Injunctive Relief; Demand for Jury Trial (Complaint) at p. 1, ¶ 2.

⁵⁴ *Id.* at pp. 2-3, ¶¶ 4-5.

⁵⁵ *Id.*

The Complaint discusses the monopoly Time Warner Cable enjoys in the Los Angeles market:

This Complaint arises from two simple facts: Time Warner enjoys a virtual monopoly for the provision of cable service to the residents of the City, and it has blatantly refused to live up to its obligations to the City resulting from the grant of that effective monopoly.⁵⁶

Press coverage discussing the lawsuit also discusses other aspects of Time Warner Cable's current monopoly, including how "Time Warner Cable has been playing hardball with DirecTV, Dish Network, Charter Communications, AT&T Inc.'s U-Verse, Cox Communications and Verizon Communications Inc.'s FiOS over terms to carry the new Los Angeles Dodgers channel."⁵⁷ Dodgers fans must now must subscribe to a pay-TV service if they want to watch a Dodgers game. To date, only Time Warner Cable and Bright House California have the channel as "Time Warner Cable reportedly has agreed to an \$8.35-billion, 25-year deal with the Dodgers' organization for the rights to distribute the channel, called SportsNet LA."⁵⁸ While the new SportsNet LA channel launched on Time Warner Cable and Bright House California systems late last month, "most other pay TV distributors have been balking at the terms for providing the channel, contending that Time Warner Cable is demanding fees that are too high." For example, an article notes that Time Warner Cable "has been asking other distributors for more than \$4 a month per subscriber, meaning the channel would cost their customers at least \$50 a year — regardless of whether those viewers watched the Dodgers."⁵⁹

⁵⁶ Complaint at p. 1, ¶ 2. DIVCA is codified at P.U. Code §§ 5800-5970.

⁵⁷ <http://articles.latimes.com/2014/mar/15/entertainment/la-et-ct-time-warner-cable-lawsuit-20140315>

⁵⁸ *Id.*

⁵⁹ *Id.*

Furthermore, “[l]ast summer, a contract dispute between Time Warner Cable and CBS Corp. resulted in a month-long blackout of KCBS-TV Channel 2 and KCAL-TV Channel 9 for customers of the cable company.”⁶⁰

While this litigation is still pending, and ORA does not take a position on the merits of the City’s competition, if true, the City of Los Angeles’ allegations are troubling and demonstrate the extent of Time Warner Cable’s existing monopoly.

3. Both of these Cases Demonstrate the Pitfalls that Come with the Significant Market Power that Comcast and Time Warner Cable May Enjoy; a Consolidation of Both Companies Would Exacerbate Existing Problems

The Comcast OII and Time Warner Cable dispute with the City of Los Angeles are just two examples of how these companies, which currently operate independently of one another, may flex their muscles and exercise their apparent monopoly-power in California. A merged Comcast-Time Warner Cable entity will have an even greater monopoly over broadband service in California. As discussed below, such an extreme consolidation in the broadband industry, cannot, under any circumstances, be a positive result for California.⁶¹ These two companies have serious allegations issues to address. Approval of a merger of these two companies while these allegations remain outstanding is not in the public interest.

B. The Proposed Merger is not in the Public Interest because it will give Comcast a Stranglehold on Broadband Access, in Contravention to Section 706

1. Proposed Comcast transaction with Charter

After announcing the proposed merger with Time Warner Cable, Comcast reached a deal with Charter Communications, LLC (Charter). Charter delivers high-speed

⁶⁰ *Id.*

⁶¹ There would likewise be an extreme consolidation in the cable industry, though that is not the subject of this Protest.

Internet, phone service and video to more than 5.7 million customers in 29 states.⁶²

Charter is currently a competitor to Time Warner Cable in the Los Angeles area. Charter initially was an outspoken critic of the proposed merger.⁶³ Charter stated in a filing at the Securities and Exchange Commission that [f]rom the regulatory perspective, it is difficult to imagine a transaction that could concentrate the industry more than the proposed Comcast merger⁶⁴

Comcast's proposed deal with Charter is contingent upon Comcast's completing its acquisition of Time Warner Cable and receiving all the necessary regulatory approval.⁶⁵ In one part of the deal, Charter would acquire about 1.4 million subscribers previously served by Time Warner Cable in Ohio, Kentucky, Wisconsin, Indiana and Alabama.⁶⁶ Then, the two companies would swap about 1.6 million subscribers, allowing each company to serve more adjacent subscribers.⁶⁷ Comcast would acquire Charter's customers in Los Angeles, New England, the South and the Northwest, while Charter would pick up some of Comcast's subscribers in the Midwest.⁶⁸ Finally, Comcast would move about 2.5 million of its current subscribers in the Midwest and the South into a new publicly traded company.⁶⁹ Charter would take a 33 percent stake in the new company, paying a mix of cash and stock. Charter would also have a path to eventually control the new company.⁷⁰

⁶² <http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-homeProfile>

⁶³ http://www.nytimes.com/2014/03/29/business/media/charter-urges-time-warner-cable-shareholders-to-reject-comcast-deal.html?_r=0

⁶⁴ *Id.*

⁶⁵ http://dealbook.nytimes.com/2014/04/27/charter-said-to-finalize-deal-with-comcast-for-subscribers/?_php=true&_type=blogs&_r=0

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

While the transactions allegedly entail Comcast's divesting an estimated 3.9 million subscribers overall,⁷¹ after it completes its acquisition of Time Warner Cable, it is not such a positive story for California. In the Los Angeles Area, the largest broadband and cable provider, Time Warner Cable, would now be part of an enormous merged entity – Comcast, Time Warner Cable and Charter. Charter, currently a competitor to Time Warner Cable in the Los Angeles area, would become absorbed into Comcast, eliminating one of Time Warner Cable's competitors in the Los Angeles area. Applicants have failed to clearly identify how the proposed merger, and the resulting consolidation of market power, creates benefits for California consumers.

2. Overall Consolidation Trend in the Broadband Industry

There is a disturbing consolidation trend in the broadband industry. Not only is Comcast proposing to acquire Time Warner Cable, it is proposing to acquire Charter's California customers, eliminating yet another competitor in California. If the CPUC, the FCC and the United States Department of Justice approve the proposed merger and related transactions, then three broadband, cable and telephone providers in California will merge into one company - Comcast. Post-merger, Comcast would control 40% of homes in the United States with broadband Internet.⁷²

Moreover, Comcast, in its bid to acquire Time Warner Cable, also appears to have attempted to neutralize several opponents of the proposed merger. For example, although Charter was initially a vocal opponent of the merger,⁷³ Comcast and Charter subsequently reached a deal, deal characterized as one that “quiets a key critic” and “is

⁷¹ *Id.*

⁷² <http://www.latimes.com/business/la-fi-ct-att-directv-deal-20140519-story.html>

⁷³ <http://www.nytimes.com/2014/03/29/business/media/charter-urges-time-warner-cable-shareholders-to-reject-comcast-deal.html>

like a bribe”, within a month after Charter filed a vocal opposition to the merger with the SEC.⁷⁴ Charter has now backed away from its criticism of the merger.⁷⁵

Although Netflix reach an agreement with Comcast to pay Comcast for a direct connection to the cable operator's broadband networks,⁷⁶ in this case, Comcast was not able to silence Netflix.⁷⁷ Netflix remains a vocal opponent of the merger, as do many content providers.⁷⁸

In apparent response to the Comcast-Time Warner Cable proposed merger, AT&T announced on May 18, 2014 that it has reached an agreement to acquire DirectTV, a direct competitor with AT&T.⁷⁹ DirecTV offers phone, broadband and video via satellite services. According to an analyst at JP Morgan, if the proposed AT&T takeover of DirectTV moves forward, “AT&T will move all video service off of its copper pipes to make room for Video on Demand (VOD) and broadband thus making the company a stronger competitor to cable’s broadband offering.”⁸⁰ AT&T currently offers its U-verse fiber-optic service, which bundles broadband, phone and TV, in 22 states.⁸¹ At present, AT&T has 11 million U-verse customers, but only 5.7 million of them get television from AT&T.⁸² DirectTV is the second-largest pay-television provider in the United States,

⁷⁴ http://www.washingtonpost.com/business/technology/comcast-sells-subscribers-to-charter-to-help-clear-way-for-merger-with-time-warner-cable/2014/04/28/e59ffb60-cf0a-11e3-937f-d3026234b51c_story.html

⁷⁵ *Id.*

⁷⁶ <http://articles.latimes.com/2014/feb/25/entertainment/la-et-ct-comcast-netflix-20140225>

⁷⁷ <http://www.engadget.com/2014/04/24/netflix-opposes-comcast-twc-merger/> [will include another cite]

⁷⁸ http://www.nytimes.com/2014/04/22/business/media/netflix-says-it-opposes-comcasts-merger-bid.html?_r=0; <http://www.reuters.com/article/2014/04/22/us-comcast-netflix-idUSBREA3L00F20140422>

⁷⁹ <http://www.latimes.com/business/la-fi-ct-att-directv-deal-20140519-story.html>

⁸⁰ <http://www.forbes.com/sites/dorothypomerantz/2014/05/13/att-is-closing-in-on-directv/>

⁸¹ *Id.*

⁸² *Id.*

behind only Comcast.⁸³ According to news reports, a combined company would allow AT&T to compete in the national broadband, communications and television markets.⁸⁴ In response to the merger announcement, the president of Free Press, a media reform organization, stated:

The captains of our communications industry have clearly run out of ideas . . . Instead of innovating and investing in their networks, companies like AT&T and Comcast are simply buying up the competition. These takeovers are expensive, and consumers end up footing the bill for merger mania.⁸⁵

Moreover, news report noted that “[t]he deals by Comcast and AT&T are expected to spark even more consolidation.”⁸⁶

This consolidation in the broadband industry, which, according to news reports, is where the growth and money will be,⁸⁷ is disturbingly familiar. Since the breakup of the original AT&T and creation of Regional Bell Operating Companies (RBOCs), there has been a great deal of consolidation of traditional telephone companies.⁸⁸ While the breakup occurred in 1984, competition in the provision of local phone service did not take off until after passage of the 1996 Federal Telecommunications Act, which authorized that competition. However, over the following decade, many start-up telephone companies went out of business or were acquired by the ILECs, thus limiting competitive options.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ <http://www.latimes.com/business/la-fi-ct-att-directv-deal-20140519-story.html>

⁸⁶ *Id.*

⁸⁷ <http://gigaom.com/2014/02/12/comcast-and-time-warner-cable-forget-tv-it-is-all-about-broadband/>

⁸⁸ In 1974, the Department of Justice filed a lawsuit against AT&T. At the time AT&T was the sole provider of telephone service throughout most of the United States. Furthermore, most telephonic equipment in United States was produced by its subsidiary, Western Electric. As a result, AT&T had almost total control over communications technology in the country. As a result of the antitrust suit, as of January 1, 1984, AT&T divested Bell several of its member-companies, which were merged into seven independent "Regional Holding Companies" or "Baby Bells".

With that recent lesson in mind, ORA sees the current proposed merger as evidence of a tipping point in terms of broadband consolidation. Should regulators approve the proposed Comcast merger with Time Warner Cable, ORA fears that it will be difficult for other broadband providers to compete effectively against Comcast and it will be extremely difficult, if not outright impossible, for new entrants to break into the broadband market. ORA asks the CPUC to not let history repeat itself. Approving a merger which would ultimately lessen, to an apparent significant degree, competition in the broadband market, and which would leave, as the only remedy, an unpredictable and uncertain Department of Justice antitrust lawsuit, is not something that the CPUC should allow to happen, to the extent it has the authority to prevent such a merger from occurring.

3. Net Neutrality

Broadband is the communications substrate on which the Internet runs. The Internet became what it is today on a common carriage system, *i.e.*, the old-fashioned telecommunications construct whereby there is a strict divide between the conduit owner and the content it transports. Such divide is quickly disappearing primarily due to two things: (1) the introduction of Internet Protocol (IP) which allowed traditional telecommunications companies to transport on its wires all manner of content, including text, video, and music; and (2) the FCC's decision in 2002, which decided that when a telecommunications company's wires were used to facilitate broadband transmissions (generally in IP), the transmission or transport was no longer a common-carrier telecommunications service but a largely unregulated "information" service.⁸⁹ The wires had not changed; only the legal classification had. This gave rise to the threat of the facilities providers to use their "lower level control" to discriminate among content, and the corresponding call for anti-discrimination or "net neutrality" rules.

⁸⁹ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802-03 ¶ 9 (2002) ("*Cable Broadband Order*").

Consistent with Section 706, ORA supports the principle of net neutrality, where all data on the Internet is treated equally, and where unreasonable discrimination and charges differentiated by user, content, site, platform, application, type of attached equipment, and modes of communication, are prohibited. This issue has been in the press recently because of ongoing litigation involving Comcast.

As referenced previously in this Protest, on January 14, 2014, the D.C. Circuit issued a decision in response to Verizon's appeal, rejecting, in part, the second set of rules the FCC had adopted regarding broadband access to the Internet.²⁰ On May 15, 2014, the FCC issued a Notice of Proposed Rulemaking which included new net neutrality rules, calling for equal treatment of all legal data traffic on the Internet but leaving room for content providers to pay for prioritized access on the so-called "fast lanes" delivered by Internet service providers.²¹

That Comcast and Time Warner Cable propose this merger in the midst of this net neutrality debate seems ironic. Already, Comcast appears to dominate the broadband pipes and businesses have no choice but to work with Comcast in ensuring that their content is not discriminated against (*i.e.*, prioritizing content or favoring traffic) when transmitting through the pipes. As a condition of the Comcast-NBC merger, Comcast must comply with the FCC's Open Internet Access Rules through 2018.²² Should regulators approve the merger, Comcast has committed to extending that commitment to Time Warner Cable.²³ However, Comcast is only obligated to comply with the FCC's

²⁰ 740 F.3d 623.

²¹ In the Matter of Promoting and Protecting the Open Internet, Broadband Industry Practices (2010 Open Internet Order), GN Docket No. 14-28, WC Docket No. 07-52, FCC 10-201, 25 FCC Rcd 17905 (2010).

²² *Memorandum and Order*, In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.; For Consent to Assign Licenses and Transfer Control of Licensees, MB Docket 10-56, FCC 11-4, 26 FCC Rcd 4238, 4275, ¶ 94 (2011); <http://blogs.wsj.com/corporate-intelligence/2014/04/08/comcast-if-you-support-net-neutrality-let-us-buy-time-warner-cable/>

²³ <http://business.time.com/2014/02/12/comcast-time-warner-cable/>

Internet Access Rules through 2018, a mere 3.5 years from now, and the FCC has only begun to conduct its inquiry. Thus Comcast's commitment does not amount to much.

In February, 2014, Comcast and Netflix reached an agreement after a long dispute between the two companies. Netflix customers had complained about deteriorating service, as videos they tried to watch stuttered and stalled in midstream.⁹⁴ Netflix agreed to pay Comcast for a direct connection to the cable operator's broadband networks to "ensure that Netflix customers receive an uninterrupted viewing experience when streaming movies and TV shows."⁹⁵ In response to the announcement, Susan Crawford stated:

'It shows that carriers such as Comcast and Verizon can use the control over their physical networks to extract payments from connecting networks . . . This is not about paying them back for the investments they have made in their networks. That was paid for a long time ago. This is an exploitation of their physical control over ingress into their networks. It means they can set whatever price they want for connecting to their networks.'⁹⁶

ORA agrees that Comcast appears to be in a position to demand its price and terms for access to its physical network. The fact that Comcast has silenced one vocal critic, Charter, in the wake of the merger announcement, is troubling, and does not bode well for the future of an open Internet.

The proposed merger between Comcast and Time Warner Cable raises serious concerns about the future of an open Internet. Comcast is already the largest broadband service provider in the United States⁹⁷ and its proposal to merge with another large

⁹⁴ <http://articles.latimes.com/2014/feb/25/entertainment/la-et-ct-comcast-netflix-20140225>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ http://www.washingtonpost.com/business/technology/comcast-sells-subscribers-to-charter-to-help-clear-way-for-merger-with-time-warner-cable/2014/04/28/e59ffb60-cf0a-11e3-937f-d3026234b51c_story.html

broadband provider, Time Warner Cable will only further consolidate the broadband industry and stifle competition. Consolidation of these two companies likely will not enhance competition and the benefits that accrue to customers from meaningful competition. Absent meaningful competition, it is incumbent upon regulators to act decisively to ensure customers are not harmed by monopolistic company behaviors.

C. The Proposed Merger will not Enhance Competition in the Local Telecommunications and Broadband Market, Contrary to the Language of Section 706

The merger of Comcast and Time Warner will consolidate market power to one company, Comcast, over the local telecommunications market in California, specifically over broadband services.²⁸ The proposed merger would give Comcast approximately 30 million broadband and 30 million cable TV customers.²⁹ If the Comcast-Time Warner Cable merger is approved, the second largest wired broadband provider would have 16.5 million customers, and the third largest wired broadband provider would have 9 million customers.¹⁰⁰ Nationally, a merged Comcast would own about 40% of the national broadband Internet market.¹⁰¹ A consolidation of market share and power in broadband access to one company will not promote competition or innovation, lower prices, or improve service.

According to UBS estimates of annual consumer revenue and projected growth, a combined Comcast-Time Warner company could see its consumer data-only revenues go

²⁸ <http://www.consumerwatchdog.org/story/consumer-groups-want-government-reject-comcast-time-warner-cable-deal>

²⁹ <http://gigaom.com/2014/02/12/comcast-and-time-warner-cable-forget-tv-it-is-all-about-broadband/>

¹⁰⁰ *Id.* These numbers do not take into account AT&T's announcement a day ago on May 18, 2014 that it plans to acquire DirectTV. AT&T and Verizon both offer mobile broadband in addition to their wired broadband services.

¹⁰¹ http://www.washingtonpost.com/business/technology/comcast-sells-subscribers-to-charter-to-help-clear-way-for-merger-with-time-warner-cable/2014/04/28/e59ffb60-cf0a-11e3-937f-d3026234b51c_story.html

from \$17 billion at end of 2013 to approximately \$23 billion by end of 2018.¹⁰² Projections for voice revenues for a merged Comcast entity go from about \$6 billion at the end of 2013 to \$6.6 billion at end of 2018.¹⁰³ The projections by USB indicate that by 2018, just 3.5 years from now, a combined Comcast and Time Warner Cable company will earn 23.17 billion annually.¹⁰⁴ The next largest competitor would earn 12.6 billion.¹⁰⁵ These figures are telling – a merged Comcast would not just be the largest broadband and cable provider in the country, it would dwarf its competitors.

The Joint Applicants' only concrete defense to the clear fact that a merged entity will make the nation's largest broadband and cable provider even larger is that Comcast and Time Warner Cable do not compete head-to-head in California, i.e., that they do not operate in the same markets.¹⁰⁶ There are a number of problems with this assertion, including: (1) this is not strictly true, as both Comcast and Time Warner operate in the market of providing content providers with last-mile access to consumers; and (2) Comcast and Time Warner Cable have the burden of showing that they cannot currently compete against one another.

1. Comcast and Time-Warner *Do* Compete in the Marketplace for Last-Mile High-Speed Broadband Access to Consumers.

The network neutrality problem can be located either in the last mile, or in a carrier's upstream connections with other carriers, content delivery networks (CDNs), and large content providers like Netflix and Google. It is in this latter instance that the problem of the two-sided market raises: A carrier's interest is in charging not only the

¹⁰² <http://gigaom.com/2014/02/12/comcast-and-time-warner-cable-forget-tv-it-is-all-about-broadband/>

¹⁰³ *Id.* 2018 is also when Comcast will no longer have to abide by the FCC's 2010 Open Internet Access Rules.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* These figures do not take into account the proposed merger of AT&T and DirectTV, which was announced only yesterday.

¹⁰⁶ Application at 20-21.

customer for Internet connectivity, but also charging content provider for access to customers.¹⁰⁷ At present, Comcast and Time-Warner offer content providers competing alternatives for this access to consumers. If the merger proceeds, this competition would disappear.

We can call the market for providing subscribers last-mile broadband connectivity to the Internet as “Side A,” but those same wires serve a separate market, the market which provides remote content providers access to subscribers as “Side B” of the wished for “two-sided” market. Indeed, a recent petition by Mozilla to the FCC, asking that side B be treated as a common carriage market, used these terms.¹⁰⁸

As if to illustrate the problem with the two-sided market under current rules, shortly after the D.C. Circuit rejected the Commission’s non-discrimination and anti-blocking rules, Netflix agreed to pay for speedier access to Comcast’s customers, although the precise terms of the agreement are unknown.¹⁰⁹ What is known is, after

¹⁰⁷ The two-sided market is discussed in the D.C. Circuit Decision, Slip Op. at 12, 53. Verizon was quite frank in its briefs, and at the September 9, 2013 oral argument, about its desire to experiment with “two-sided” payment models. In its 2010 Order, the FCC noted the “likely detrimental effects of access and prioritization charges on the virtuous circle of innovation ... Less content and fewer innovative offerings make the Internet less attractive for end users than would otherwise be the case.” *Open Internet Order*, at ¶28 and fn. 79.

¹⁰⁸ *In the Matter of Mozilla Petition to Recognize Remote Delivery Services in Terminating Access Networks and Classify Such Services as Telecommunications Services Under Title II of the Communications Act*, filed May 5, 2014. ORA questions Mozilla’s analysis, which accepts as *fait accompli* the 2002 *Cable Broadband Decision* and its determination that Side A was not a telecommunications transport service but rather, an information service.

¹⁰⁹ See, e.g., Ramachandran, “Netflix Will Pay Comcast for Speed,” February 24, 2014 *Wall Street Journal*, A1; see also <http://www.wired.com/business/2014/03/comcast-opinion/> (“in the months prior to the deal, Netflix customers on Comcast and Verizon’s networks had been experiencing some very serious service issues.”). See also “Netflix customers who use Comcast Face Streaming Hiccups (Feb. 12, 2014), http://www.twincities.com/business/ci_25116477/netflix-members-who-use-comcast-face-streaming-hiccups; “Netflix HD streaming over Comcast broadband,” <http://www.dsreports.com/forum/r28820834-Speed-Netflix-Comcast-does-not-support-HD-streaming> (Nov. 17, 2013).

signing the deal, Netflix was the first company to express concerns about a net neutrality model based on these types of agreements.¹¹⁰

California's largest and most innovative firms and venture capitalists have urged the FCC to do something to level the playing field between last-mile monopolist ISPs and the content providers that make the Internet the desired service that it is. ORA attaches letters from Google and 179 other, largely California Internet companies, and from California's venture capitalists, pleading with the FCC to act.¹¹¹ In the absence of effective FCC action, the Comcast-Time Warner merger is even more problematic.

2. The Fact that Comcast and Time-Warner Have Chosen Not to Compete "out of region" Should Not Mask the Anti-Competitive Potential of the Merger.

The fact that Comcast and Time Warner apparently *have chosen*, to not compete against each other does not justify the proposed merger. ORA is not aware of any reason why Time Warner Cable and Comcast could not build out their networks in each other's territory, thereby providing more robust competition in the broadband market in California. The proposed merger reduces customer options in California and diminishes competitive market forces to the detriment of California consumers. For these reasons, the proposed merger of Comcast and Time Warner Cable does not enhance competition in the broadband market in California, in contravention to and mandates Commission action pursuant to Section 706, even if that action is initially only the gathering of a solid

¹¹⁰ http://www.washingtonpost.com/business/economy/netflix-lays-out-opposition-to-comcast-time-warner-cable-merger-in-shareholder-letter/2014/04/21/7552190a-c9a2-11e3-a75e-463587891b57_story.html

¹¹¹ Exhibit B is a letter by 180 firms, led by the engines of California's new economy – Facebook, EBay, Twitter, and Google, among others – urging the FCC to act decisively to "protect users and Internet companies on both fixed and mobile platforms against blocking, discrimination, and paid prioritization." Exhibit C is a letter from over 50 of California's best-known venture capitalists, urging similar action by the FCC.

factual record on which to make recommendations to the FCC, or to demand California-specific conditions to the merger.¹¹²

D. The Proposed Merger does not Comply with Section 854

The Joint Applicants claim that the merger “will promote the deployment of advanced voice services and enhance competition in the voice marketplace.”¹¹³

However, beyond making sweeping statements about how an extremely large merged company will be in a better position to “offer an array of advanced voice services”, the Joint Applicants fail to explain how this merger will enhance competition in voice services in California.¹¹⁴ As referenced in the CPUC’s 2011 Market Share Analysis, as of 2009, 50% of the interconnected VoIP market was concentrated amongst Comcast and Time Warner Cable.¹¹⁵

The Joint Applicants also do not meet the requirements of Section 854(b).¹¹⁶ They do not demonstrate how the merger will “[m]aintain or improve the financial condition of the resulting public utility doing business in the state . . . the quality of service to public utility ratepayers in the state . . . [or] the quality of management of the resulting public utility doing business in the state.”¹¹⁷

As previously note, Section 854(c) requires the Commission to “consider reasonable options to the proposal recommended by other parties, including no new merger, acquisition, or control, to determine whether comparable short-term and long-

¹¹² See, e.g., “Who Controls the Internet? A State-by-State Look”, at <http://www.webpagefx.com/blog/internet/who-controls-the-internet-a-state-by-state-look/>, graphically showing Comcast’s market power in California and other states; see also Garling, “Comcast Merger Also Endangers Neutral Internet Access,” *San Francisco Chronicle* (February 13, 2014), available at <http://blog.ctnews.com/techblog/2014/02/13/comcast-merger-also-endangers-neutral-internet-access/>

¹¹³ Joint Application at 15.

¹¹⁴ *Id.*

¹¹⁵ <http://www.cpuc.ca.gov/NR/rdonlyres/22731419-A492-4D52-A09A-0815C3D06A61/0/110322MarketShareAnalysis.pdf>

¹¹⁶ P.U. Code § 854(e).

¹¹⁷ P.U. Code § 854(c).

term economic savings can be achieved through other means while avoiding the possible adverse consequences of the proposal.”¹¹⁸ ORA recommends that the CPUC not approve this merger under Section 854 as the Joint Applicants have failed to meet their burden of proof.

E. The CPUC Needs More Data on Whether the Merger Will Impact Public Safety

On February 15, 2012, the FCC issued a report and order extending outage reporting requirements to interconnected VoIP.¹¹⁹ The FCC recognized that consumer use of interconnect VoIP is growing in lieu of traditional phone service hence the importance of a reliable VoIP service to reach emergency services such as 9-1-1.¹²⁰ The FCC report highlights some significant VoIP outages that include a 2011 Comcast outage in New Hampshire that left many Comcast customers without VoIP service and therefore without the ability to make emergency calls for hours.¹²¹

The 2011 CPUC Market Share Analysis reported that 50% of the interconnected VoIP market was concentrated amongst Comcast and Time Warner Cable.¹²² ORA has concerns with VoIP and Broadband outages that impact public safety. The proposed merger makes it more critical for the CPUC to know how a combined entity may impact public safety. More information and data is needed on VoIP and Broadband outages in California by each company.

V. CONCLUSION

For the aforementioned reasons, ORA protests the application as Joint Applicants have not demonstrated that the proposed merger complies with Section 854 or Section

¹¹⁸ P.U. Code § 854(d).

¹¹⁹ <http://www.fcc.gov/document/fcc-requires-outage-reporting-interconnected-voip-improve-911>

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Communications Division of CPUC Market Share Analysis of Retail Communications in California 2001 through 2009, dated March 10, 2011.

706. The proposed merger would unite potentially the two largest providers of high-speed last mile broadband service in the State and likely reduce competition and consumer choice in both the markets for consumer telephone and broadband services.

ORA contends that the most effective way to enhance competition in the broadband market in California is for Comcast to enter the Los Angeles and Southern California market by building its own facilities or for Time Warner Cable to do the same in Northern California. Joint Applicants' rationale that the merger will not harm competition because they have **chosen** not to compete in the current marketplace is faulty. The fact that Comcast and Time Warner Cable have elected to not compete demonstrates that the market already lacks incentives for robust competition. Comcast and Time Warner Cable have failed to provide a rational explanation as to why entering each other's market and directly competing with each other by building out their own facilities is not possible. Moreover, Comcast and Time Warner Cable do compete in the marketplace for last-mile high-speed broadband access to consumers.

ORA respectfully requests that the CPUC re-categorize this proceeding as adjudicatory, and either open up a fact-finding phase in the current proceeding or issue an OII to gather information to determine whether the proposed merger comports with Section 854 and Section 706.

Respectfully submitted,

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May 19, 2014